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December 16, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TWB-204
Washington, D.C. 20554

Re: WC Docket No. 02-112, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; CC Docket No. 00-175, 2000 Biennial Regulatory Review of Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules

Notice of Ex-Parte Communication

Dear Ms. Dortch:

On Tuesday, December 16, 2003, Brett Kissel, Gary Phillips and Anu Seam of SBC Communications Inc., and Robert Halperin of Crowell Moring, met with William Dever, Renee Crittendon, Pamela Megna, William Kehoe, Brent Olson, Michael Carowitz, Ben Childers and Jon Minkoff of the Wireline Competition Bureau. The purpose of the meeting was to address the AT&T *ex parte* of November 26, 2003 in the above captioned proceeding. The attached documents were provided to the Division staff.

In accordance with section 1.1206 of the Commission's rules, this letter is being filed in the above referenced proceeding via the Commission's ECFS system. Should you have any questions regarding the attached, please do not hesitate to contact me by whatever means are most convenient for you.

Sincerely,

A handwritten signature in black ink that reads "Brett A. Kissel". The signature is written in a cursive, flowing style.

ATTACHMENT

cc:	W. Dever	W. Kehoe
	P. Megna	P. Megna
	R. Crittendon	B. Olson
	M. Carowitz	J. Minkoff
	B. Childers	

VoIP Is Set To Explode

- VOIP in the industry slang is poised to revolutionize telecommunications from top to bottom.¹
- “VoIP is the most significant, fundamental new technology shift in telecommunications in decades”²
- VoIP “‘is something to be scared of, and is probably set to become the biggest story of the year’ in the telecom sector . . . ‘akin to a giant meteor hurtling on a collision course toward Earth.’”³
- “VOIP holds huge potential to shake up the telecom industry by slashing costs and offering new features traditional carriers can’t offer.”⁴
- By the end of the first quarter of 2004, AT&T will have deployed “VoIP services to consumers in the top 100 markets in the United States” thereby bypassing the BOCs.⁵
- “The [Time Warner, MCI, Sprint] deal creates a powerful industry alliance that would allow the cable and long-distance companies to bypass the vast local telephone networks controlled by dominant players such as Verizon Communications Inc. and BellSouth Corp.”⁶
- In a major acceleration of its plans to roll out a new telephone service using Internet technology, Time Warner Inc.’s cable division said it now expects to offer the service to almost all 18 million households that could connect to its cable systems by the end of next year.⁷
- “[VoIP] represents the next evolution in consumer communications -- leveraging the added capabilities of cable and the global reach of the MCI IP network to create services that leave the old public switched network behind.”⁸
- “VoIP technology offers huge promise for revolutionizing our nation’s telecommunications infrastructure. The Wall Street Journal calls VoIP the “new gold rush” in telecom. You might say we’re in a transformation – Ma Bell will soon become Ma Virtual Ringtone.”⁹

¹ Cynthia L. Webb, *Time Warner Dials a Deal Online*, Washington Post, Dec. 9, 2003.

² Shawn Young, *AT&T to Launch Internet-Based Telephone Service*, WALL ST. J., Dec. 11, 2003 at B6.

³ *Sir, to Whom May I Direct Your Free Call?*, *supra* (reporting analysis by Daiwa Securities); *see also* Anne Squeo, *Internet Phone Service Threatens Industry’s Giants*, WALL ST. J., Nov. 28, 2003, at B1.

⁴ *Id.*

⁵ AT&T News Release, *AT&T Unveils Major Voice Over Internet Initiative: Will Expand Business and Launch Consumer Offers in 2004* (Dec. 11, 2003) <http://www.att.com/news/item/0,1847,12627,00.html>.

⁶ *Id.*

⁷ Shawn Young, *Time Warner Cable Expands Net-Phone Plan*, WALL ST., Dec. 9, 2003, at A19.

⁸ Brigitte Greenberg, *Time Warner Cable Rolling Out VoIP With Help From MCI, Sprint*, Communications Daily, Dec. 9, 2003, Vol. 23, No. 236.

⁹ Statement of Commissioner Jonathan S. Adelstein, Voice Over IP Forum, Dec. 1, 2003.

SBC COMMUNICATIONS INC.'S
RESPONSE TO
AT&T'S NOVEMBER 26, 2003 EX PARTE

December 16, 2003

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I. Introduction

Now that it has lost its fight to keep the Bell Operating Companies (“BOCs”) from competing for interLATA business, AT&T is seeking to handicap the BOCs by, among other things, asking the Commission to impose regulatory constraints that would hinder their competitive freedom. In this proceeding, AT&T is seeking to have BOCs’ provision of long distance services be declared dominant. Such a declaration would insulate AT&T and other established long distance providers from vigorous competition by, among other things, making it more difficult for BOCs to introduce new pricing plans that consumers find attractive.

To accomplish this objective, AT&T contends, in a recent *ex parte* submission responding to Staff inquiries, that the Commission should construct a new market definition for some unspecified bundle of communications services.¹ AT&T sets no limits on what it believes this new market should contain, as it raises more questions than it answers. Does the right “market” consist of all instances in which a buyer purchases local and long distance services from the same provider? Does it consist only of the sale of multiple services when at least one is discounted? If so, how does one determine if a service is discounted given the plethora of long distance calling plans? Does it consist only of sales of local and long distance service together at a single price?² Is it limited to “unlimited” plans, and if so, on what basis can this offering be meaningfully distinguished from stand-alone “unlimited” long distance plans offered by wireline

¹ *AT&T Ex Parte*, November 26, 2003.

² The Commission uses the term “bundle” to refer to sales of more than one good or service at a single price. In its Report and Order eliminating the prohibition on the bundling of customer premises equipment with local or long distance services, the Commission stated that its prior rule prohibiting bundling did “not prohibit carriers from offering ‘one-stop shopping’ for CPE and telecommunications services, but requires only that the goods or services be priced separately.” *Policy and Rules Concerning the Interstate, Interexchange Marketplace; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules*, 16 FCC Rcd. 7418, at 7422 ¶ 5 (2001), Further Notice of Proposed Rulemaking, 13 FCC Rcd. 21531 at 21533, n.5 (1998). *See also id.* at 7443, ¶ 41 (“The benefits of bundling come from allowing consumers to purchase an all-inclusive bundle at a single price that consists of interstate, domestic, interexchange transmission services combined with their choice of enhanced service and CPE.”). Thus, we generally use the term bundle to refer to the sale of more than one product or service at a single price.

and wireless carriers? Is it limited to bundles of communications services that do not include video services? Is it limited to bundles of communications services that do not include Internet access services? AT&T offers no precise definition, nor does it offer any empirical evidence to support any particular market definition. Given the absence of evidence and answers to even these most basic questions, AT&T's contentions are worthless.³

Indeed, it is ironic that AT&T – which was declared non-dominant in 1995 when it had more than 60% of the market – should now contend that the market structure demands that this Commission undertake dominant carrier regulation. After all, it was AT&T that repeatedly told this Commission that: “[T]here are virtually no barriers to entry . . . into the interexchange market”⁴ As a result, AT&T argued that:

[C]arriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably. The pricing of their services is effectively constrained by competitive market forces: if such carriers sought to charge supracompetitive rates, or discriminate unreasonably, customers would simply move to other carriers; and carriers that attempt to charge prices below cost would generate losses that could never be recouped.⁵

Since then, of course, traditional wireline service – both local and long distance – has faced rapidly spiraling competition from other wireline, wireless, and most recently from VoIP providers. Here again, AT&T talks out of both sides of its mouth. In its most recent financial

³ Throughout this paper, we address mass market (consumer and small business) services only. Not even AT&T argues that the BOCs have market power in the provision of long distance services (whether sold in bundles or not) to medium and large businesses.

⁴ AT&T's Reply in *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, CC Docket No. 79-252, at 23 (filed June 30, 1995). See also, e.g., AT&T Reply Comments, Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, CC Docket No. 79-252, at 26 and n.49 (June 20, 1995)(the industry is characterized by “the absence of significant barriers to entry”). AT&T News Release, AT&T Announces Third Quarter 2003 Earnings Oct. 21, 2003 <http://www.att.com/news/item/0,1847,12397,00.html>.

⁵ Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier in *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, CC Docket No. 79-252, at 16 (filed September 22, 1993) (emphasis added). *In the Matter of Telephone Number Portability*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 03-284 (November 10, 2003).

report for the Third Quarter of 2003, AT&T describes the competition its wireline long distance business faces from “wireless and Internet substitution.”⁶ Indeed, when the Commission announced its decision to require the portability of numbers from wireline to wireless, the Chairman explained that this action would increase intermodal competition: “we act to eliminate impediments to competition between wireless and wireline services.”⁷ A recent industry analysis released by Goldman Sachs reports that the “migration to wireless is [an] unstoppable trend,” which is likely to lead to wireline voice services in the home becoming “simply a complement [to] the main wireless voice service for many people.”⁸

But the inability of the BOCs to exercise market power in long distance, and AT&T’s duplicity in asserting otherwise, does not even end there. According to AT&T’s *ex parte* comment, there seems to be no such thing as VoIP. Yet, the President of AT&T Labs, Hossein Eslambolchi, recently reported that the Internet programming language at the heart of VoIP “is like Pac-Man. . . .[e]ventually, it will eat everything in its way.”⁹ Moreover, on December 11, 2003, AT&T’s Chairman announced that “VoIP is the most significant, fundamental new technology shift in telecommunications in decades”¹⁰ By the end of the first quarter of 2004, Mr. Dorman said, AT&T will have deployed “VoIP services to consumers in the top 100 markets in the United States” thereby bypassing the BOCs.¹¹

VoIP cannot be ignored. Under the *Merger Guidelines*, new entry is considered by DOJ and FTC to be timely if it is likely to occur within 2 years.¹² It is also important for this

⁶ AT&T Announces Third Quarter 2003 Earnings, *supra*.

⁷ FCC News Release, Statement of Chairman of Michael K. Powell, *In re Telephone Number Portability*, Nov. 13, 2003.

⁸ Goldman Sachs Global Equity Research (November 21, 2003) at 8, 16.

⁹ Peter Grant and Almar Latour, *Circuit Breaker: Battered Telecoms Face New Challenge: Internet Calling*, WALL ST. J., Oct. 9, 2003, at A1 (“Circuit Breaker”).

¹⁰ Shawn Young, *AT&T to Launch Internet-Based Telephone Service*, WALL ST. J., Dec. 11, 2003 at B6.

¹¹ AT&T News Release, AT&T Unveils Major Voice Over Internet Initiative: Will Expand Business and Launch Consumer Offers in 2004 (Dec. 11, 2003) <http://www.att.com/news/item/0,1847,12627,00.html>.

¹² DOJ/FTC 1997 Horizontal Merger Guidelines, ¶ 3.2 (“Merger Guidelines”).

Commission to give special attention to the fact that some VoIP entry has already occurred and thus far been successful.¹³ As industry observers have warned: VoIP “‘is something to be scared of, and is probably set to become the biggest story of the year’ in the telecom sector . . . ‘akin to a giant meteor hurtling on a collision course toward Earth.’”¹⁴

What AT&T’s *ex parte* presentation does make clear is that market definition at this dynamic time is an elusive and ultimately unnecessary exercise. Regardless of how the market is defined – whether it be the Commission’s long-standing definition of all domestic, interstate interexchange services, “all distance” service, all voice services, or something else – it is undisputed that BOC long distance service offerings face an extraordinary amount of competition on multiple fronts and such competition is only increasing. Classification of any BOC long distance service offering as dominant would be improper not only because BOCs lack the requisite market power, but also because the imposition of dominant carrier regulation plainly would create obstacles to the provision of new, pro-competitive long distance offerings.

II. AT&T’s Arguments for a Separate Bundled Market Rely On Speculation Rather Than the Relevant Law, Economics, and Marketplace Realities.

AT&T’s arguments are built on nothing but the shifting sands of speculation. AT&T ignores the legal and economic standards applicable to bundled or “cluster” markets. It also fails to provide any evidence to support its supposition that some form of bundled communications offering containing local and long distance services constitutes a distinct product market. Moreover, AT&T’s attempt to redefine markets ignores the commercial realities. In short, AT&T’s contentions have little if any relationship to either the relevant law or the relevant facts.

¹³ See *id.* at ¶ 3.1.

¹⁴ *Sir, to Whom May I Direct Your Free Call?*, *supra* (reporting analysis by Daiwa Securities); see also Anne Squeo, *Internet Phone Service Threatens Industry’s Giants*, WALL ST. J., Nov. 28, 2003, at B1.

A. AT&T Ignores The Elements Necessary To Define A Bundled (Or “Cluster”) Market.

Bundled or cluster markets are an exception to the general approach to market definition, a point AT&T totally ignores. In so doing, AT&T fails to demonstrate that the exception to the general approach should be applied here. In fact, it should not.

In defining relevant markets, the Commission generally follows the framework established by the courts and the antitrust agencies, *i.e.*, identifying the goods or services that consumers would switch to if prices were increased, and the ability of competitors to increase their supply of a given service in response to a price increase by other market participants. For example, in explaining why it has found that mass market long distance (or local exchange) services and larger business long distance (or local exchange) services are distinct markets, the Commission has stated, “We distinguish mass market consumers from larger business customers because the services offered to one group may not be adequate or feasible substitutes for services offered to the other group, and because firms need different assets and capabilities to target these two markets successfully.”¹⁵

Under the DOJ and FTC Horizontal Merger Guidelines, product markets are defined by reference to the products consumers would switch to if a monopolistic seller of a given product imposed a “small but significant and non-transitory” price increase.¹⁶ Antitrust courts consider other services to be part of the relevant product market when they are “reasonably interchangeable” by consumers or where there is “cross-elasticity of demand” between the alternatives. *E.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).¹⁷

¹⁵ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712 at 14746 ¶ 68 (1999), citing *WorldCom/MCI Merger Order*, 13 FCC Rcd 18025 at 18119 ¶ 164 (1998); *Bell Atlantic/NYNEX Merger Order*, 12 FCC Rcd 19985 at 20016 ¶ 53 (1997).

¹⁶ Merger Guidelines, ¶ 1.11.

¹⁷ The courts consider such factors as the views of consumers as to whether alternative products are true substitutes for each other. *E.g., Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 199 (3rd Cir. 1992) (considering what “consumers desire”), *cert. denied*, 507 U.S. 921 (1993); *R.D. Imports Ryno Indus. V. Mazda Distribs. (Gulf)*, 807 F.2d 1222, 1225 (5th Cir. 1987) (market includes all automobiles that consumers view as substitutes), *cert. denied*, 484 U.S. 818 (1987). Likewise, the courts have considered industry recognition and the industry’s consideration of the pricing of the alternative product. *E.g., United*

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The Commission has never viewed local and long distance services as substitutes. A local call is not interchangeable with a long distance call. Nonetheless, AT&T apparently seeks to include these services within the same product market.¹⁸ In so doing, AT&T confuses substitutes (which are in the same product market) with complements (which are not).¹⁹ For example, drivers purchase tires, motor oil, and gasoline for their cars, and can, if they choose, buy them from a single source. These items are not substitutes for each other; one cannot use tires to perform the function of oil. They are not, therefore, in the same product market, regardless of whether some consumers buy them from the same source.²⁰

There are, to be sure, some circumstances in which non-substitutable goods will be deemed part of the same “cluster” market, but those circumstances are extremely limited. As the leading antitrust authority has stated, “the rationale for clustering non-substitutable goods into a single market must be regarded as a severe exception to ordinary market definition criteria, which define markets in terms of substitutability.” Areeda & Hovenkamp, IIA Antitrust Law ¶ 565c, p. 337. AT&T fails to recognize this fundamental point.

Areeda and Hovenkamp’s observation is reflected in the case law on point. Those cases make clear that cluster markets are recognized only if commercial realities effectively *require* consumers to purchase non-substitutable items together. For example, the sale to service companies of replacement parts for Kodak photocopiers was found to be a cluster market (even

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States v. Continental Can Co., 378 U.S. 441, 454 (1964) (can and bottle makers consider each other’s prices); *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 309 (7th Cir. 1976) (makers of brushes and rollers do not consider price of aerosol or spray paints).

¹⁸ As set forth above, AT&T may wish to include other services in its undefined bundled product market as well without any showing that these additional services are substitutes for long distance service.

¹⁹ Prices of substitutes move in the same direction in response to changes in output. That is, if output of coal decreases, the price of coal and of its substitutes (such as fuel oil) will increase. Prices of complements move in the opposite direction. If the output of gasoline decreases, the price of gasoline will increase, but the demand, and thus the price for automobiles will decrease. Areeda & Hovenkamp, IIA Antitrust Law ¶ 565a, p. 329 (2002).

²⁰ See *In re British Oxygen Co.*, 86 F.T.C. 1241 (1975), *rev’d on other grounds*, *BOC Int’l, Ltd. v. F.T.C.*, 557 F.2d 24 (2d Cir. 1977).

though the parts are not substitutes for each other) because (1) non-Kodak parts cannot be used in Kodak machines and (2) as a commercial reality, companies servicing Kodak machines must stock a full line of replacement parts for them. *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1203-04 (9th Cir. 1997).

In contrast to these examples, courts generally reject claims of a cluster market unless customers have no practical choice but to purchase the services at issue as a bundle. The existence of one-stop shopping alternatives is generally not sufficient to establish a distinct market separate from the sale of the same items individually. “Specialty shops which offer only a limited range of goods are generally considered in the same market with larger more diverse ‘one-stop shopping’ centers.” *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1477 (9th Cir. 1997), *aff’d on other grounds*, 525 U.S. 299 (1999).²¹ Also, the fact that one market participant may have certain competitive advantages in selling a bundle of services is not dispositive. *Westman Commn. Co. v. Hobart Int’l*, 796 F.2d 1216 (10th Cir. 1986) (alleged advantages defendant had in supplying multiple products did not justify the creation of a cluster market).

Use of a cluster market approach is also not proper if market conditions for each of the no substitutable goods or services are dissimilar. “Most fundamentally, goods cannot be clustered unless there is a sufficient basis for inferring that the defendant has the required degree of market power over each of the goods in the cluster.” As Judge Greene concluded in *U.S. v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981), clustering is improper if what appears to be monopoly power in an alleged cluster market disappears when the items in that alleged market are disaggregated. *Id.* at 1376.²²

²¹ Areeda & Hovenkamp, *supra*, ¶ 565c, p. 332. See also *Thurman Industries, Inc. v. Pay’N Pak Stores, Inc.*, 875 F.2d 1369, 1376 (9th Cir. 1989) (specialty stores selling house paint through price reductions or other marketing efforts may be able to lure “do-it-yourselfers” away from one-stop building product superstores).

²² Thus, in *U.S. v. AT&T*, the court adopted a cluster market approach for telecommunications equipment because requiring proof of anticompetitive conduct with respect to each type of equipment would have been unduly burdensome and duplicative.

The Commission itself has taken this same approach with respect to long distance services, holding that each long distance service (e.g., MTS, WATS, high capacity services) is a separate product market (and

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In their review of the applicable case law, Areeda and Hovenkamp conclude that a bundled or “cluster” market definition is appropriate if and only if (1) most customers would be willing to pay monopoly prices for the convenience of receiving the defendant's grouping of products, *or* (2) economies of joint provision (economies of scope) make distribution of the cluster cheaper per good than distribution of each separately, *and* (3) the firms supplying one of the products in the cluster could not easily add the others as well. Areeda & Hovenkamp, *supra*, ¶ 565c, p. 332.

AT&T does not demonstrate that its proposed market redefinition satisfies the tests set forth in the relevant case law, as set forth above and summarized by Areeda and Hovenkamp. First, AT&T's entire argument is based on the fact that BOCs price multi-service packages at prices that are *less* than, not more than, the *a la carte* prices. Thus, unlike *Philadelphia Natl. Bank*, for example, there is no evidence to support the assumption that customers would be willing to pay monopoly prices for the convenience of a bundle. Presumably, if sellers of bundles thought they could demand a higher price attributable to the convenience of “one-stop shopping,” they would increase their price for bundles accordingly.

Second, there can be no doubt that some other firms offering long distance services can (and do) offer local exchange services (or other services) in combination with long distance services. MCI and other CLECs in this very proceeding have taken credit for being the first to offer bundles of local and long distance services, thus establishing that firms other than BOCs

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each point-to-point market is a separate geographic market), but that all will be treated together unless there is evidence that the competitive conditions in a specific market vary from those existing as a whole. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy Rules Concerning the Interstate, Interexchange Marketplace Regulatory Treatment of LEC Providers of Interexchange Services*, CC Docket Nos. 96-149 & 96-61, Second Report and Order in CC Docket 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15,756 at 15,782 ¶ 40 (1997) (“*LEC Classification Order*”), *recon.*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10,771 (1999).

can offer such service bundles.²³ AT&T itself also offers such bundles.²⁴ Bundles of local and long distance services are also sold by many cable systems (such as Cox) and VoIP providers (such as Vonage).²⁵ Wireless service providers, of course, also sell the functional equivalent of this bundle.²⁶ Indeed, in response to Staff's inquiry, AT&T could not identify a single difference between its (or MCI's) bundled service offerings and those of the BOCs.²⁷ In contrast, these and other firms continue to sell services on an *ala carte* basis as well. For example, AT&T has stated that roughly three-quarters of its consumer revenues come from the sale of long distance services alone (*i.e.*, not with local service).²⁸ Thus, the test for a bundled product market has not been met.

B. AT&T's Arguments In Support Of A Bundled Market Are Based On Pure Speculation And Not Commercial Realities.

AT&T's argument is based solely on the theory that a separate market exists for the bundle if a significant number of consumers purchase the bundle at a lower price, rather than

²³ See *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements 2000 Biennial Regulatory Review*, MCI Comments, CC Docket No. 00-175, WC Docket No. 02-112, at 8 (June 30, 2003) ("Currently, MCI serves about 3 million local customers, and offers local service to approximately 65 percent of U.S. households."); *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements 2000 Biennial Regulatory Review*, Comments of Z-Tel Communications, Inc., CC Docket No. 00-175, WC Docket No. 02-112, at 1, 3 (June 30, 2003) (Z-Tel offers packages of local, long distance and "enhanced" services.).

²⁴ "AT&T Chairman Outlines Aggressive Competitive Strategy at CSFB Conference," Dec. 11, 2003 www.att.com/news/item/0,1847,12629,00.html (quoting AT&T CEO Dorman as saying, "Bundled local and long distance offerings are the future, and have proven to be a terrific growth business for AT&T. With our entry into Southern California, Missouri, Kansas and Oklahoma, we're now in 24 states, representing 61 million households, and we are currently testing in 11 states -- meeting our goal of testing or actively marketing bundled services to consumers in 35 states by year-end 2003.").

²⁵ Vonage just announced it doubled the number of calls handled on its VoIP network in four months, to 100 million. *Communications Daily*, Dec. 11, 2003.

²⁶ For example, AT&T Wireless offers family all distance calling plans starting at \$39.99 a month. <http://www.attwireless.com/personal/plans/sharedplans.jhtml?requestid=47472>

²⁷ *AT&T Ex Parte*, pp. 3-5. Rather, as set forth below, it sought to avoid answering the question by pointing to alleged advantages BOCs have in providing service bundles, entirely ignoring its own offsetting competitive advantages.

²⁸ See Shawn Young, *Phone Service Bundles Could Backfire as Customers Switch*, *Wall St. J.*, November 7, 2003 (Bundles account for more than half of MCI's customer revenue and 22% of AT&T's consumer revenue).

purchase each service separately at a higher price. This theory is illogical and the conclusion is unsubstantiated.

1. AT&T's Argument Is Purely Speculative, Too Imprecise To Be Useful, and Ignores Commercial Realities.

AT&T's argument that a cluster market of some undefined group of telecommunications services constitutes a separate market is entirely unsupported by any record evidence. It is based rather on the mere assertion that sellers of those bundled services could profitably raise the price of the bundle by 5%. AT&T provides absolutely no evidence to support that assertion, and it is purely speculative. Nor does AT&T provide any support from case law or otherwise for the propositions that bundles priced below the sum of the separate services create a cluster market or that, in such cases, the prices of bundles are not adequately constrained by the *a la carte* offerings of the separate elements of the bundle.

As important is AT&T's inability to precisely define the bundle. That is because the marketplace shows that there are several different approaches to bundling, with different marketplace participants including different services within the bundles they offer. Wireless providers sell mobility with "all distance" voice communications.²⁹ Cable companies, for example, sell local and long distance telephone services with multi-channel video and/or broadband services in their bundles.³⁰ AT&T increasingly includes DSL in its bundles.³¹ While

²⁹ See Griff Witte, *An Evolutionary Edge*, Washington Post, December 3, 2003, at E01 ("Driving the change is wireless. With consumers – especially the younger ones – increasingly accustomed to paying the same amount no matter how far the call travels.").

³⁰ See *VoIP: The Next Big Thing for Cable*, Broadband Daily, Dec. 10, 2003 ("Cox Communications ... provides circuit switched service in nearly half of its footprint"). According to its website, Cox offers the "Cox Digital Suite" (video, high-speed internet, and digital phone), which includes unlimited local and long distance for \$48.75 a month and boasts that its price is "lower than SBC ... and lower than AT&T." http://www.cox.com/oc/Telephone/default_bsa.asp. In addition to Cox, Time Warner Cable, Comcast and Cablevision also offer local and long distance Internet phone service. See Matt Richtel, *Time Warner to Use Cable Lines to Add Phone to Internet Service*, N.Y. Times, Dec. 9, 2003.

³¹ "AT&T Adds DSL Service to Communications Bundle in Ohio," Dec. 12, 2003 <http://www.eetimes.com/pressreleases/prnewswire/117329>

this evidence makes clear there is no rational basis for defining a market in a manner that ignores these competitors, that is precisely what AT&T urges this Commission to do.

In lieu of evidence, AT&T argues that the prices of bundles of wireline local and long distance services could profitably be increased because (1) bundles are the only method through which unlimited wireline long distance is offered, at least by BOCs, at a reasonable price; and (2) consumers “may be motivated” to buy bundles that include unlimited long distance service because (a) they believe it will be less expensive (even if it is not) or (b) in so doing, they obtain the security of knowing that their bills will not exceed the bundled price regardless of usage.³² AT&T provides no evidence to support those assertions and they are, in fact, untrue. In fact, these assumed “reasons” are at odds with commercial realities.

First, unlimited long distance, in fact, can be purchased at a reasonable price without the need to purchase a bundle. In claiming otherwise, AT&T cites only Verizon’s product offering, while conveniently ignoring those of others. AT&T itself offers unlimited long distance, priced at approximately \$30 per month.³³ Thus, AT&T’s first argument is flatly wrong, and AT&T knows better.

Second, AT&T’s claim that consumers might be willing to pay more for an all-distance plan because they “may believe” they will save money or can avoid the risk of unexpectedly higher bills is not only unsupported, but frivolous. As an initial matter, the obviously speculative supposition that consumers “may believe” they will save money does not establish a product market. AT&T does not even attempt to show that consumers would choose or stick with more expensive bundles rather than less expensive alternatives because of this ostensible “belief.” Nor does AT&T support its supposition that consumers, in fact, would pay more than they currently pay for an all-distance package merely to avoid merely the *risk* of a higher bill. It certainly does not show that, as a result of this asserted risk aversion, a hypothetical monopoly provider of

³² *AT&T Ex Parte*, p. 2.

³³ See AT&T Unlimited Plus Plan, at http://www.consumer.att.com/unlimited_plus/.

unlimited wireline long distance packages could increase the profitability of those packages by raising its rates for the bundle if the price of stand-alone services and of other types bundled packages (offered by wireless providers, cable companies, or other VoIP providers) remained unchanged.

Indeed, this speculative set of claims is not only unsupported, but illogical. Telephone service is not like health or life insurance where consumers pay significant amounts to protect themselves against catastrophic loss. A consumer will not pay more than necessary for wireline long distance, month after month, merely to protect herself against the possibility that in some future month she might make lots of long-distance calls. To put it mildly, AT&T is grasping at straws.

Third, AT&T fails to present any evidence or argument to show the necessary point that BOCs have a similar degree of market power in each element of the ostensible bundle. As noted, such a showing must be made in order for a cluster market to exist; otherwise, it could not be the case that the services in the bundle must be purchased as a cluster. This omission by AT&T is not surprising because no such showing could possibly be made. Various bundles offered in the marketplace include, for example, long distance service, video services, wireless voice service and broadband Internet access service.³⁴ It is beyond dispute that SBC has no market power in any of these services. In short, the essential elements for a cluster market are nowhere to be found.

2. The Competitive Impact of Wireless Services Is Critical to the Analysis.

AT&T contends that “wireless bundles do not impose any pricing constraint on wireline bundled pricing plans and its component parts, at least with respect to households comprised of

³⁴ Indeed, AT&T itself has announced bundles of local, long distance and broadband services. AT&T Press Release, “AT&T Enters Four New Markets For Local Residential Phone Service and Extends DSL Service To Three Additional Ones,” Dec. 11, 2003, <http://www.att.com/news/item/0,1847,12628,00.html> See also “AT&T Adds DSL Service to Communications Bundle in Ohio,” Dec. 12, 2003 <http://www.eetimes.com/pressreleases/prnewswire/117329>. See also note 31, *supra*.

more than one person.”³⁵ Given AT&T’s own statements and the findings of this Commission, AT&T’s contention that wireless services can effectively be ignored is disingenuous and wrong.

The long distance portion of a wireline service bundle is functionally indistinguishable from long distance options sold by wireless carriers. AT&T’s attempt to draw a distinction between them ignores both commercial realities and its own public statements. AT&T has long told the investment community that it is facing declining long distance voice revenue, because “customers are relying increasingly on wireless and Internet communications.”³⁶ Even AT&T’s licensee and former affiliate, AT&T Wireless Services, perceives the competition between wireless and wireline offerings.³⁷

Marketplace data clearly show that consumers use wireless service to substitute for wireline long distance services and are causing a decline in the revenue generated by wireline long distance carriers. The Commission’s *Eighth Annual Wireless Competition Report* states that:

The long distance, local, and the payphone segments of wireline telecommunications have all been losing business to wireless substitution. Long distance volumes and revenues are down at AT&T, MCI, and Sprint as customers shift to wireless services to

³⁵ *AT&T Ex Parte*, p. 7.

³⁶ See AT&T 2002 Annual Report, Chairman’s Letter at www.att.com/ar-2002/html/cl1.html. See also AT&T Form 10-K for the fiscal year ended December 31, 2002, at 2 (“[T]he introduction and growth of wireless carriers has also put additional competitive pressure on traditional voice long distance business services, particularly in the “dial 1” long distance, card and operator services segments.”); *id.* at 7 (“[C]onsumer long distance voice usage is declining as a result of substitution of wireless services, Internet access and e-mail/instant messaging services.”); *id.* at 14 (“[L]ong distance telecommunications providers have been facing competition from non-traditional sources, including as a result of technological substitutions, such as Internet telephony, high speed cable Internet service, e-mail and wireless services.”); *id.* at 17 (“The telecommunications industry is in a period of rapid technological evolution, marked by the introduction of new product and service offerings and increasing satellite, wireless, fiber optic and coaxial cable transmission capacity for services similar to those provided by AT&T. ... In particular, the rapid expansion of usage of wireless and e-mail services has contributed to an overall decline in traffic volume on traditional wireline networks.”)

³⁷ *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements 2000 Biennial Regulatory Review*, Comments of AT&T Wireless Services, Inc., CC Docket No. 00-175, WC Docket No. 02-112, at 2 (June 30, 2003) (“AWS ... [and] other unaffiliated Commercial Mobile Radio Service (“CMRS”) carriers are increasingly viewed as true competitors to BOC long distance and bundled wireline/wireless services.”)

make their calls. Verizon, SBC, and BellSouth saw business and consumer access lines fall 3.6, 4.1, and 3.2 percent, respectively, in 2002, for a total decrease of 5.5 million lines, with wireless substitution being a significant factor.³⁸

In addition to the millions of people who have “cut the cord,” tens of million more use their wireless phone to make long distance calls that otherwise would be made on their wireline phone. One major reason, of course, is price. As the *Eighth Annual Report* notes, wireless service can be cheaper than wireline.³⁹ The Commission cites industry analysts comments that, for many wireless customers making a long distance call in the evening “using a wireless phone would actually be cheaper than using the fixed line phone in most cases,”⁴⁰ and “given that a large number of night and weekend minutes are now regularly included in wireless pricing schemes ..., it is often cheaper to use your wireless phone while in your home.”⁴¹ Wireless is not only “eat[ing] directly into long-distance revenue,” it is leading way toward bundled, flat-rate plans.⁴²

AT&T’s arguments to the contrary are completely lacking in credibility. It contends that service equivalent to a single wireline in a multi-person household cannot be provided by a single wireless connection. To be comparable to a wireline service, AT&T asserts, there must be a wireless phone for each member of the household. (Otherwise, it contends, when one person leaves the house with the wireless phone, the others are stranded.) But this argument ignores the fact that to receive the exact same functionality via wireless service as is available from wireline

³⁸ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eighth Report, WT Docket No. 02-379 at 50 ¶ 103 (July 14, 2003) (“*Eighth Annual Report*”).

See also Almar Latour, *Bells Predict Number Rule Will Create Mess*, WALL ST. J., Nov. 14, 2003 (“Analysts estimate that five million to seven million people in the U.S. rely **only** on cell phones for their communication needs.”) (emphasis added).

³⁹ *See Eighth Annual Report* at 50, ¶ 104.

⁴⁰ *See id.*

⁴¹ *See id.* at 51.

⁴² *An Evolutionary Edge*, *supra*.

service, consumers could have a single wireless phone that is not removed from the house. Stated differently, AT&T's argument that each member of a household would need to have a separate wireless phone if wireless is to substitute for wireline service is an apples to oranges comparison because AT&T failed to consider that the mobility feature of a wireless phone is not available with wireline service.⁴³

Moreover, that a household may retain wireline phone service does not establish that wireless service is not a substitute for, and "does not impose any pricing constraint," on wireline services, as AT&T knows full well. The two technologies unquestionably compete as second lines and they compete for long distance minutes. The plain fact is that wireless calling is increasingly substituting for wireline calling. Recent developments, such as wireline/wireless number portability, and wireline/wireless call forwarding, wireless broadband, and universal messaging systems, will only increase the substitutability of these technologies. Indeed, Cingular and others have deployed services that permit consumers to receive calls made to wireless numbers on their wireline telephones, thus providing other marketplace evidence that wireline and wireless calls are interchangeable.

III. Regardless of the Precise Contours of the Relevant Market, There is No Reasonable Basis for Dominant Carrier Regulation.

While it is clear that adoption of AT&T's vague, unsubstantiated, and self-serving proposed market definition would be arbitrary and capricious, the parameters of the correct market definition are not necessarily clear. Market definition is a notoriously difficult exercise, all the more so in industries, such as the telecommunications industry, which are characterized by rapid technological change and convergence. Fortunately, it is well recognized that the difficult task of defining markets need not be undertaken if it is not necessary. As shown below,

⁴³ AT&T argues that the fact that wireless phone batteries would run out of power ignores the obvious point that if the phone remains at home it can be virtuously continuously charged. AT&T also contends that the ability to have multiple extensions on a single wireline service *may* be more important, but once again, AT&T provides no empirical support for its naked assumption.

redefining the long distance market is not, in fact, necessary. Regardless of the theoretically possible market definition employed, it is clear that BOC long distance service is offered in an intensely competitive marketplace and that dominant carrier regulation is not only inappropriate, but also would actually harm consumers and the public interest.

A. Markets Need Not Be Formally Defined Unless Necessary To Decide The Issues Presented.

The Commission need not engage in formal market definition analysis to reach the conclusion that dominant carrier regulation of BOCs is not necessary after sunset of the Section 272 structural and related requirements. It is well understood that market definition is a means to an end, *i.e.*, determining whether market power exists; it is not an end in itself. “Finding the relevant market and its structure is not a goal in itself, but a surrogate for market power.”⁴⁴ For example, the Supreme Court held that, even where the FTC finds anticompetitive effects, the “failure to engage in detailed market analysis is not fatal.” *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986).

As a practical matter, this Commission often focuses on the real issue of competitive effects without first defining a market. For example, in approving AT&T’s acquisition of TeleCommunications Inc., the Commission stated that it must “consider whether the merger is likely to produce any adverse competitive effects,” without the “need to determine at this time whether narrowband and broadband Internet access services provided to residential and small business customers are sufficiently different to support the conclusion that they are in separate markets.”⁴⁵

⁴⁴ P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law*, ¶ 531(a) (2002).

⁴⁵ *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., To AT&T Corp.*, Memorandum Opinion and Order, CS Docket No. 98-178, 14 FCC Rcd 3160, 3205-06 at ¶¶ 92-93 (Feb. 16, 1999) (“*AT&T/TCI Order*”). See also *In re Applications of Geotek Communications, Inc.*, *In re Applications of Wilmington Trust Company For Consent to Assignment of 900 MHz Specialized Mobile Radio Licenses*, File Nos. 0000013318; 0000013319, 0000013321, 0000013499, 0000013499, 0000013504, 0000014139, 911823, 911825, 911827; File Nos. 911830, 911831, 911832, 911833, Memorandum Opinion and Order, 15 FCC Rcd 790 at 802-03 ¶¶ 26-28 (Jan. 14, 2000).

Market definition is particularly difficult in dynamic marketplaces in which technology is forcing rapid changes, as is the case here.⁴⁶ Indeed, in such circumstances, defining markets can do more anticompetitive harm than competitive good because the resulting market definition is likely to be outmoded and subsequently misapplied. The data on which a market definition typically rests are historical data; in rapidly changing markets, historical data are not necessarily predictive of future market conditions.⁴⁷ For example, AT&T's market definition would exclude not only wireless services, but also telephone services offered by cable systems and other providers of VoIP services. But wireless services already are fast overtaking wireline services; and just days ago, in announcing an aggressive plan to roll out VoIP services, AT&T characterized VoIP as "the most significant, fundamental new technology shift in telecommunications in decades."⁴⁸ These are but two examples underscoring the risks of defining markets characterized by rapid technological changes based on a snapshot in time.

B. Market Redefinition Is Not Necessary Here Because, Regardless Of The Precise Contours Of The Market, BOCs' Long Distance Service Offerings – Both Stand-Alone And In Bundles – Face Enormous Competition.

Precise market definition is not necessary here because the BOCs unquestionably do not have market power in the provision of long distance services today under any reasonable formulation of the relevant market.⁴⁹ Market power is the ability to control prices and exclude competition.⁵⁰ In our comments and reply comments, we have already demonstrated that BOCs

⁴⁶ See, e.g., *New York v. Kraft General Foods, Inc., et al.*, 926 F. Supp. 321, 341 (S.D.N.Y. 1995) ("Professor Kahn also expressed the view that any market definition and any measure of market concentration that ignores the dynamic aspects of changing demands . . . would produce misleading results").

⁴⁷ The Commission has recognized the need to exercise care in analyzing markets that are transitioning from regulation to competition. See, e.g., *SBC/Ameritech Merger Order*, *supra*, 14 FCC Rcd. 14712 at 14774-76 ¶¶ 63-64.

⁴⁸ AT&T News Release, "AT&T Unveils Major Voice over Internet Initiative: Will Expand Business and Launch Consumer Offers in 2004," Dec. 11, 2003 <http://www.att.com/news/item/0,1847,12627,00.html>

⁴⁹ See *An Evolutionary Edge*, *supra* ("[C]ompetition for local and long-distance service [is] more intense than ever.").

⁵⁰ See e.g. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982); *Deauvill Corp. v. Federated Dep't Stores*, 756

(continued...)

do not have market power in the provision of long distance services today.⁵¹ In contrast, AT&T has submitted no evidence that BOCs can charge supracompetitive prices for long distance services, bundled or otherwise. During the roughly four years that BOCs have been offering long distance services in some states (*i.e.*, New York, Texas), there has been no evidence of supracompetitive pricing by BOCs for long distance services. To the contrary, long-distance prices have been plummeting to the point that they are now at an all-time low.⁵²

Under these circumstances, the only remotely conceivable basis for subjecting the BOCs to dominant carrier regulation would be if the Commission concluded that BOCs quickly will obtain the power to charge supracompetitive prices for long distance services. There is no reasonable basis on which the Commission could so conclude.

1. BOCs Cannot Quickly Obtain Market Power.

AT&T and others who seek to impose dominant carrier regulation on BOCs rely primarily on their oft-rejected arguments that, unless constrained by regulators, BOCs are likely to obtain market power by discriminating against their competitors or by engaging in predatory pricing. Neither outcome is remotely possible.

First, neither price nor non-price discrimination is possible because, among other things, it could not be effective without being noticeable to both competitors and regulators.⁵³ Because access charges are publicly published (through tariffs), any price discrimination (or increases in access prices allegedly due to improper cost shifting) would be easily detectable.⁵⁴ And non-

(...continued)

F.2d 1183, 1188 (5th Cir. 1985); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982).

⁵¹ Comments of SBC Communications Inc., CC Docket No. 02-112, at 16-37 (“SBC Comments”); Declaration of Drs. Dennis Carlton, Hal Sider, and Alan Shampine (attached thereto) (“Carlton/Sider/Shampine Decl.”), at ¶¶ 18-40 (June 30, 2003); Reply Comments of SBC Communications Inc., CC Docket No. 02-112, at 6-14 (July 28, 2003) (“SBC Reply Comments”).

⁵² See *e.g.*, Almar Latour, *Local Phone Companies Face Siege in an Industry in Turmoil*, WALL ST. J., Aug. 13, 2003 at A1 (“Amid the turmoil, prices are headed just one way, “down.”).

⁵³ See Carlton/Sider/Shampine Decl., ¶¶ 46-50.

⁵⁴ See *id.*, ¶ 47.

price discrimination could not possibly be both significant enough to be effective in the marketplace and insignificant enough to be unnoticed by sophisticated competitors and regulators. Given the unlikelihood of undetected discrimination, it is inconceivable that a BOC could discriminate so rampantly as to quickly acquire market power.

Moreover, even if undetected discrimination were possible, a BOC has no incentive to discriminate because it could not be sure that it would derive any benefit from it.⁵⁵ If a customer of another long distance service decided to switch providers because of dissatisfaction with its current service provider, there is no reason to assume that the customer would chose the BOC as its new long distance provider. Increasingly, wireless and VoIP services are options the consumer might choose and there are a host of other wireline carriers from which to choose, as well.

In any event, AT&T and other proponents of dominant carrier regulation simply cannot avoid the real world evidence that discrimination has not been a problem in analogous circumstances (*e.g.*, wireless, intraLATA toll, CPE).⁵⁶ Thus, there is no reasonable basis on which one can conclude that existing prohibitions against discrimination are inadequate to prevent it.⁵⁷

Second, it is not possible for BOCs to engage in predatory pricing because, among other things, recoupment would be unattainable.⁵⁸ It is highly unlikely, to the point of being unthinkable, that BOCs could eliminate all large, established IXCs through predatory pricing.⁵⁹ Of course, the BOCs would also have to eliminate all intermodal competition from wireless, cable and VoIP providers as well. Any notion that they could do is pure fiction.

⁵⁵ See SBC Comments, at 43-44.

⁵⁶ See *id.*, at 47-48.

⁵⁷ See Carlton/Sider/Shampine, ¶ 49.

⁵⁸ See SBC Reply Comments, at 30-31; Carlton/Sider/Shampine Decl., ¶¶ 51-58.

⁵⁹ See Carlton/Sider/Shampine, ¶ 55.

Third, AT&T's claims of quick BOC monopolization have become even more ludicrous since the comments and reply comments were filed in this docket last summer. The competitiveness of the marketplace has only increased and it is expected to increase further. As set forth above, AT&T's arguments notwithstanding, wireless services are increasingly being used in place of wireline local and long distance services. More and more cable systems are offering telephone services in combination with their broadband and video service offerings. And, as AT&T itself has stated, VoIP will change the competitive landscape even more significantly and present significant new competitive challenges to incumbent service providers.

The competitive impact of VoIP is enormous. Industry observers have warned that VoIP “‘is something to be scared of, and is probably set to become the biggest story of the year’ in the telecom sector . . . ‘akin to a giant meteor hurtling on a collision course toward Earth.’”⁶⁰ The Yankee Group believes that BOCs will be forced to abandon their traditional networks for packet switched networks in order to compete with lower cost cable telephony.⁶¹ IDC has stated that “The cable MSOs already have the lead against the telcos in the residential broadband race and are already starting to bundle circuit-based telephony with their cable modem services. As they move from circuit telephony to VoIP (via broadband), they will gain another advantage over telcos: telephony at a lower price point.”⁶²

Even Mr. Dorman, AT&T's CEO, recognizes the dramatic impact of VoIP. He stated that “‘voice-over Internet protocol’ services are destined to grow explosively. Resistance is

⁶⁰ Nicholas Thompson, *Sir, to Whom May I Direct Your Free Call?*, N.Y. Times, Oct. 12, 2003 at § 3, p. 1 (reporting analysis by Daiwa Securities).

⁶¹ The Yankee Group, “Broadband Access Technologies -- MSOs Look to Voice to Complete Triple Play,” p. 18 (July 2003).

⁶² IDC, “Industry Development and Models, Voice over Broadband; Does Vonage Have the RBOCs Number?,” Sept. 2003 at 9. *See also* “Wall St. Analysts Told Of Cable's New Push Into Telephony,” Communications Daily, Dec. 12, 2003.

futile. This is one of those things that is like a tidal wave coming.”⁶³ Moreover, he views AT&T as being able to thrive in that environment.⁶⁴

Whether these forecasts turn out to be correct is not the point; the point is that BOCs face enormous competition in both local and long distance services and that competition is increasing. In these real-world circumstances, it is pure fantasy to suggest that BOCs are likely to obtain market power. Given the level of competition in all segments, and the various sources of that competition (wireline, wireless, cable), BOCs lack and are most unlikely to obtain (quickly or otherwise) the power profitably to increase local service or long distance service prices.

2. Entry Barriers Are Low.

Even if competition were not currently restraining prices and even if competition in the marketplace were not expected to intensify, market power would still not exist if entry barriers are low. As the D.C. Circuit explained, “[i]n the absence of significant [entry] barriers, a company probably cannot maintain supracompetitive pricing for any length of time,” even in a highly concentrated market.⁶⁵ Of course, the Commission has long found that entry barriers into the long distance marketplace are low.⁶⁶

⁶³ See Peter J. Howe, *AT&T nets a share of local calls*, Boston Globe, Nov. 20, 2003 at C1.

⁶⁴ AT&T Press Release, “AT&T Chairman Outlines Aggressive Competitive Strategy at CSFB Conference,” Dec. 11, 2003, www.att.com/news/item/0,1847,12629.oohtml (quoting AT&T CEO Dorman as saying, “As the industry leader in carrying IP traffic, AT&T understands the networking challenges and industry direction better than anyone. We understand that customers will be drawn to the convenience, quality and control that VoIP can offer if migrated properly -- and we’re on the verge of a VoIP revolution. AT&T -- more so than others -- has the skills, scope and scale to effectively build the VoIP utility.”)

⁶⁵ *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

⁶⁶ See *360° Communications Company, and ALLTEL Corporation, For Consent to Transfer Control of 360° Communications Company and Affiliates*, Memorandum Opinion and Order, 14 FCC Rcd 2005 at 2017 ¶ 26 (Dec. 30, 1998) (“Evidence on the number of long distance companies in operation throughout the country and in individual states also suggests that entry barriers may be quite low.... In many markets, competition will increase further if and when regional Bell Operating Companies are permitted to enter these markets.”).

The emergence of VoIP, in fact, will reduce entry barriers even more.⁶⁷ Some may even find it possible to offer telephone services at no charge. One new entrant, Skype, offers free downloads of its VoIP software. As of October 26, 2003, more than 1.8 million people have downloaded the software. Skype's goal is to have 200 million registered users within one year.⁶⁸ Other VoIP providers such as Vonage offer unlimited local and long distance calling for \$34.99 per month.⁶⁹ A VoIP system is now being used to provide all local and long distance service to the entire Dartmouth College campus.⁷⁰

The offering of service bundles does not create high entry barriers. The low entry barriers facing firms that wish to provide service bundles is evident by the different types, and growing number of firms offering them: ILECs; CLECs; wireless providers; cable providers; and other VoIP providers.⁷¹

⁶⁷ Whether the Commission views VoIP as a current competitor in the market or a potential new entrant, the competitive impact is essentially the same. Under the Merger Guidelines, the Justice Department and FTC recognize that if entry is sufficiently easy, then the likelihood of such entry "will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern." Merger Guidelines ¶ 3.0. As the courts have observed, "a firm that *never* enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market regardless of whether entry ever occurs." *United States v. Baker Hughes, supra.*, 908 F.2d at 988 (emphasis in original); *see also United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973) ("a potential competitor . . . on the edge of the market" can exert a "beneficial influence on competitive conditions in the market"); *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 329 (8th Cir. 1982) ("threat of entry . . . will likely exercise a restraining influence on pricing.").

As the Merger Guidelines point out, entry is considered to be timely if it is likely to occur within 2 years. *Id.* ¶ 3.2. It is also important for this Commission to give special attention to the fact that recent entry has occurred and thus far been successful. *Id.* ¶ 3.1.

⁶⁸ David S. Bennaham, Mr. Watson, *Come Here! It's Free*, Oct. 26, 2003, L.A. Times at M5.

⁶⁹ *Id.*

⁷⁰ *See* Katie Hafner, *A New Kind Of Revolution In The Dorms Of Dartmouth*, N.Y. Times, Sept. 23, 2003 at C-7.

⁷¹ *See, e.g., Qwest branches into Internet-based telephone service, supra* (Vonage offers unlimited local and long distance Internet phone service for \$35 a month); *Phone-Service Bundles Could Backfire as Customers Switch, supra* (IDT Corp. offers local and long distance service for \$40 a month, about \$20 less than Verizon's similar plan); Matt Richtel, *Time Warner to Use Cable Lines to Add Phone to Internet Service*, N.Y. Times, Dec. 9, 2003 ("Time Warner Cable, the second-largest cable company in the country, with 11 million subscribers, entered the phone market last May with service in Portland, Me., signing up 8,000 subscribers, who pay \$39.95 to \$49.95 for unlimited local and domestic long-distance calling.")

C. AT&T Laundry List Of Supposed BOC Advantages Ignores Both Countervailing AT&T Advantages And Commission Precedent.

As set forth above, even if bundled services constituted a separate product market, the BOCs could not possibly raise prices to a supracompetitive level because of the presence of both other sellers of comparable bundles and *a la carte* service offerings. Seeking to avoid that obvious point, AT&T launches a smokescreen, contending that BOCs have certain advantages that give them an unfair edge in the marketplace. AT&T contends that it and MCI must obtain local service over the BOC network; BOCs have “first access” advantage on customer-initiated contacts; BOCs avoid imputation requirements or those requirements are inadequate; and UNE-P prices and marketing and advertising represent a far greater portion of a CLEC’s retail price than a wholesale long distance prices and marketing and advertising comprise of a BOC’s retail price.⁷²

These points are misleading and ultimately irrelevant. Among other things, the allegation that BOCs have an unfair “first access” advantage assumes that consumers are not aware of competitive alternatives for long distance services, despite being bombarded with advertising and switching away from BOCs by the millions. Moreover, identifying two cost elements for two different types of service providers and arguing (without evidence) that those cost elements standing alone are greater for one set of providers than another, of course, proves nothing. The allegation that long distance wholesale prices and marketing costs form a lower percentage of BOCs’ retail price than UNE-P and marketing costs form of IXC/CLEC’s prices is undoubtedly due to the simple fact that BOCs have other more significant expenses, such as operation and maintenance of the local exchange network which is provided to CLECs at below-cost rates.

In any event, there is no reason to handicap BOCs’ ability to compete unless the Commission is prepared to handicap AT&T and others by removing their own countervailing

⁷² *AT&T Ex Parte*, pp. 2-5.

competitive advantages, assets that AT&T totally ignores. AT&T has long trumpeted its advantages of “unrivaled” brand name recognition, technologically up-to-date nationwide (and worldwide) network, a large base of enterprise customers who support that network, and its “best in class” cost structure.⁷³ For example, in contrast to its unsupported assertions here that “the BOCs continue to be portrayed and perceived as being *the* telephone company,”⁷⁴ AT&T’s Chairman also declared on December 11, 2003 that it is AT&T which has “the most trusted and proven name in voice services . . . [and] is uniquely qualified to lead the industry in this transformation.”⁷⁵ It also enjoys various regulatory advantages, including, significantly, the fact that BOCs (and other ILECs) have carrier of last resort obligations, but AT&T (and others) do not. While BOCs and other ILECs are obliged to serve all customers, AT&T (and others) cherry-pick those customers perceived to be the most profitable.⁷⁶

At AT&T’s behest, the Commission has recognized in similar circumstances that the relevant issue in the context of determining whether a carrier has market power is not whether any one market participant has certain competitive advantages; rather, it is whether those competitive advantages are so great as to foreclose competition.⁷⁷ AT&T does not even attempt to make that showing here.

⁷³ AT&T Press Release, “AT&T Chairman Outlines Aggressive Competitive Strategy at CSFB Conference,” *supra* (quoting AT&T CEO Dorman as saying, “With AT&T’s scale advantage, there is no reason we should lose on price and we intend to be very competitive going forward”). See also AT&T 2001 Annual Report at 7 (“AT&T Consumer has the best profit margin in the industry – more than six times its largest competitors.”). See *id.* at 10 (AT&T has “the largest, most sophisticated communications network in the world”); Jason Gertzen, *AT&T Begins Offering Local Telephone Service in Wisconsin*, Milwaukee J. Sentinel, July 11, 2003 (“AT&T does have good name recognition. When you ask many consumers who their local phone provider is they currently tell you its AT&T and they were not even operating in the state. It’s an advantage,” said Drew Petersen, director of legislative affairs for TDS).

⁷⁴ *AT&T Ex Parte*, p. 10.

⁷⁵ *Id.* See also *AT&T to Launch Internet-Based Telephone Service*, *supra* at B6.

⁷⁶ *Id.* (quoting Mr. Dorman as stating, “We continue to take a targeted approach to attract and retain high-value customers to our bundled services offerings, allowing us to drive profitability in this area of our business.”).

⁷⁷ See *Motion of AT&T To Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, at ¶ 73 (1995) (“[T]he issue is not whether AT&T has advantages, but ‘whether such advantages are so great as to preclude the effective functioning of a competitive market.’”).

D. The Imposition Of Dominant Carrier Regulation Would Be Unreasonable and Against the Public Interest.

Dominant carrier regulation is appropriate only if it is necessary to prevent a carrier with market power from increasing its prices above competitive levels and sustaining them at that level through restrictions in its own output.⁷⁸ There is no such allegation here. Indeed, AT&T acknowledges that bundled prices are lower than *a la carte* prices. And AT&T provides no evidence that if BOCs raised the price of their bundles, wireline, wireless, cable and VoIP competitors do not have the capacity to handle consumers who would want to switch service providers.

The Commission has recognized that “Dominant carrier regulation should be imposed . . . only if the benefits of such regulation outweigh the burdens that would be imposed on competition, service providers, and the Commission.”⁷⁹ Indeed, the Commission has found the regulations can stifle innovation and needlessly increase the costs of providing service. Specifically, the Commission has determined that the advance tariff filing requirements, which lie at the heart of dominant carrier regulation, impede vigorous competition by: (a) removing incentives for competitive price discounting; (b) reducing or eliminating carriers’ ability to make rapid, efficient responses to changes in demand and cost; (c) burdening carriers attempts to make new offerings; and (d) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs.⁸⁰ Thus, imposition of dominant carrier regulation would be counterproductive as it would likely lead to less, not more, vigorous competition.

⁷⁸ See *LEC Classification Order*, 12 FCC Rcd 15,756, at 15,804 ¶ 85; *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy Rules Concerning the Interstate, Interexchange Marketplace*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10,771 at 10,777 ¶ 8 (1999).

⁷⁹ *Id.* ¶ 87.

⁸⁰ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20,730 at 20761 ¶ 53 (1996).

IV. Conclusion

AT&T's contentions that the Commission should redefine the long distance market and create a separate product market for some indefinite bundle of communications services and that BOCs should be found dominant in that product market are entirely unsupported and wrong. AT&T has not established that a new market comprised of no substitutable services should be created and it is abundantly clear the marketplace in which BOCs offer long distance service is intensely competitive. In these circumstances, BOCs do not have, and are most unlikely to obtain, market power in the provision of long distance services whether they are offered on a stand-alone basis or in bundles.